

IN THE SUPREME COURT OF TENNESSEE,
SPECIAL WORKERS' COMPENSATION APPEALS PANEL,
AT NASHVILLE

**ROBERT WARNER v. BARNEY POTTS d/b/a POTTS ROOFING and
REALM NATIONAL INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Rutherford County
No. 02-3853WC, Hon. Robert E. Corlew, Chancellor**

**No. M2003-02494-WC-R3-CV - Mailed: February 7, 2005
Filed - April 29, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In determining whether the appellant was an employee or an independent contractor, the trial court evaluated the factors listed in Tenn. Code Ann. § 50-6-102(10) distinguishing between employees and independent contractors and considered the evidence to be inconclusive. The trial court based its determination of independent contractor status on a Form I-18, Election of Non-Coverage by Sub-Contractor, filed by the appellee almost two years prior to the accident. The appellant contends that the trial court erred by determining he was an independent contractor. For the reasons set forth below, we reverse the holding of the trial court and remand for a determination of degree of disability.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right: Judgment of the Chancery Court Reversed and Remanded.

SCOTT, SR. J. delivered the opinion of the Court, in which DROWOTA, C.J., and STAFFORD, SP. J., joined.

Steve C. Norris, Mayo, Norris, & Carpenter, Nashville, TN, for the appellant, Robert Warner.

D. Brett Burrow and Jason A. Lee, Brewer, Krause, & Brooks, Nashville, TN, for the appellees, Barney Potts d/b/a Potts Roofing and Realm National Insurance Company.

MEMORANDUM OPINION

The employee-appellant, Robert Warner, initiated this civil action to recover workers' compensation benefits arising out of a November 1, 2001, accident in which he fell from a roof, sustaining severe injuries. The issue presented for trial was whether Mr. Warner was working as an employee of Potts Roofing or as an independent contractor on the day of his accident. The trial court found that no workers' compensation benefits were owed to Mr. Warner on the grounds that he was an independent contractor. Thus, the Chancellor made no findings as to the amount of benefits owing had the employer been found liable. The employee has appealed, challenging the trial court's determination.

At the time of trial, Mr. Warner, a high school graduate, was fifty years old and had worked primarily in the construction trade since 1972. In December 1999, Mr. Warner began performing roofing work for Barney Potts, d/b/a Potts Roofing, signing a Form I-18 at the request of Mr. Potts.¹ From December 1999 until October 2000, Mr. Warner performed occasional sub-contract roofing jobs for Mr. Potts, as well as for other clients. As a sub-contractor, Mr. Warner supplied his own tools and equipment, and hired, supervised, and paid his own employees. During that time, Mr. Potts merely supplied roofing paper and shingles, paying Mr. Warner for each job at its completion. Between October 2000 and July 2001, Mr. Warner spent time in Florida, and upon his return resumed his previous work arrangement with Mr. Potts until August 17, 2001, at which time Mr. Potts had no further jobs available.

In September 2001, Mr. Warner contacted Mr. Potts regarding his joining Mr. Potts' crew. At trial, Mr. Potts testified, "So he came to me and asked me did I have anything for him to do as part of my crew. I said, 'Yes, you can come out, because I've known you for a while, and you can work. I know your work.'" (Trial transcript, p. 143, ll. 5-8). Following their September 2001 conversation, the business relationship between Mr. Warner and Mr. Potts changed from their previous arrangement. In contrast to the previous relationship, Mr. Potts was always present at the site and he, rather than Mr. Warner, managed the project. Mr. Potts directed the crew, made work assignments, and had the authority to fire workers. Mr. Warner worked at locations and times established by Mr. Potts; he had no supervisory or hiring authority and supplied no equipment or materials other than personal hand tools for his own use. Additionally, Mr. Warner received paychecks from Mr. Potts every Friday for that week's work instead of upon completion of the job. Moreover, Mr. Warner paid no other employees out of his check.

On November 1, 2001, Mr. Warner fell approximately twenty feet while working on a roof for Mr. Potts and was seriously injured. As a result of the injury, Mr. Warner is primarily restricted to a wheelchair, although he can negotiate short distances with the aid of a walker. Evidence presented at trial revealed he is unable to perform the type of work he did in the past. The trial court denied Mr. Warner's claim for workers' compensation benefits, finding that he was an independent contractor and not an employee of Potts Roofing on the date of the accident.

Appellate review is *de novo* upon the record of the trial court, with a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). To determine where the preponderance of the evidence lies, the reviewing court is required to conduct an independent examination of the record. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of findings of fact by a trial court requires this Panel to weigh the factual findings and

¹ The Form I-18 is a Tennessee Department of Labor form entitled: "Election of Non-Coverage by Sub-Contractor." The form that Mr. Warner signed stated in pertinent part: "I, Robert Warner agree that I am a sole proprietor/partner employing approximately zero employees. I am acting in the capacity of sub-contractor, and do not wish to elect coverage for myself under the general contractor's workers' compensation coverage. This election of non-coverage was not advised, counseled or encouraged by the said general contractor, or anyone acting for the general contractor. I understand I cannot waive the rights of my employees and that if I do not have worker's compensation coverage the general contractor will be liable for my employees." (Trial exhibit 5).

conclusions of the trial court in workers' compensation cases in greater depth. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

When the controlling facts are undisputed, the question of whether a worker is an employee or an independent contractor is one of law for the courts. Stratton v. United Inter-Mountain Tel. Co., 695 S.W.2d 947, 953 (Tenn. 1985). The Tennessee Workers' Compensation Act covers only "employees." Therefore, once the existence of an employment relationship is established, the employer has the burden of proving the worker was an independent contractor rather than an employee. Galloway, 822 S.W.2d at 586. The parties stipulated at trial that Mr. Warner fell and severely injured his back while working for Mr. Potts as either an employee or independent contractor. Because this stipulation establishes that an employment relationship existed, Mr. Potts bears the burden of proving that Mr. Warner was an independent contractor and therefore not entitled to workers' compensation benefits. We find that Mr. Potts has failed to meet this burden.

Once an employment relationship is established, we next turn to the factors to be considered in determining whether an individual is an employee or an independent contractor under Tenn. Code Ann. § 50-6-102(10). The factors the court shall consider are "(A) The right to control the conduct of the work; (B) The right of termination; (C) The method of payment; (D) The freedom to select and hire helpers; (E) The furnishing of tools and equipment; (F) Self scheduling of working hours; and (G) The freedom to offer services to other entities." No one factor is dispositive, but the right to control and the right to terminate are usually deemed to be strong evidence of an employer-employee relationship. Starflight, Inc. v. Thoni, 773 S.W.2d 908, 910 (Tenn. 1989).

Generally, courts have employed two tests to determine whether the relationship is that of a statutory employee or an independent contractor: (1) whether the work being performed by the contractor in question is the same type of work usually performed by the company or is part of the regular business of the company, and (2) whether the company has the right to control employees of the contractor. Hendrix v. Ray-Ser Dyeing Co., 462 S.W.2d 483, 485 (Tenn. 1970). It is undisputed from the testimony of both parties that Mr. Warner provided roofing services for Potts Roofing, and while the trial court found much of the evidence to be inconclusive, the record supports the contention that Mr. Potts had the right to control the work of Mr. Warner. For example, prior to September 2001, when Mr. Warner was in charge of a project he always roofed from bottom to top. When Mr. Warner joined Mr. Potts' crew in September 2001, he was required to change his roofing method because "Barney [Mr. Potts] said he started at the top and worked his way to the bottom." Mr. Warner additionally testified that Mr. Potts assigned him to work on particular portions of a roof. Although Mr. Potts testified that he did not need to control the details of Mr. Warner's work because Mr. Warner was an experienced roofer, Mr. Potts never stated he did not have authority to do so. Importantly, "the test is not whether the right to control was exercised but merely whether the right to control existed." Wooten Transports, Inc. v. Hunter, 535 S.W.2d 858, 860 (Tenn. 1976).

Further, we find the record shows that as of September 2001, not only did Mr. Potts have the right to control Mr. Warner's work, but also the right to terminate Mr. Warner at any time. Other indications of an employer/employee relationship are that Mr. Warner no longer hired his

own helpers, he then regularly used Mr. Potts' large tools including air compressors and ladders, and he worked at locations and times established solely by Mr. Potts. Finally, the method of payment also changed. Previously, Mr. Potts had paid Mr. Warner after a job was completed at the rate of twenty-four dollars per square; in contrast, beginning September 2001, Mr. Potts paid Mr. Warner every Friday for work done that week. Notably, Mr. Warner's pay was then at a lower rate than the prior compensation.

The workers' compensation law is to be "rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage." Hodge v. Diamond Container General, Inc., 759 S.W.2d 659, 664 (Tenn. 1988). Applying the required liberal construction, we find the preponderance of the evidence establishes Mr. Warner was an employee on the date of his accident. Mindful of this well-established principle, the trial court stated it was inclined to construe the evidence in Mr. Warner's favor and find him to be an employee, but for the Form I-18 signed in December 1999. While the existence of a Form I-18 is not unrelated to the question of whether a worker is an employee or an independent contractor, we find the trial court erred by giving the Form I-18 undue weight in its analysis, especially in view of the change in the parties' relationship in September 2001.

It is the duty of the court to determine if a worker is an employee or independent contractor, and the employer cannot use a contract to take that responsibility from the court. Stratton, 695 S.W.2d at 953. The Workers' Compensation Act similarly prohibits the use by an employer of any "contract or agreement, written or implied, or rule regulation or other device" to evade its workers' compensation obligations. Tenn. Code Ann. § 50-6-114(a). The cited code section clearly establishes the public policy against the making of any agreement which would reduce an employer's liability for permanent disability benefits under the Act. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. Workers' Comp. Panel 1995).

The Form I-18 is not a contract defining the relationship between the parties, but rather it is a notice that an independent contractor has not elected to be covered by workers' compensation. The purpose of the form cannot be to declare the status of the worker as an independent contractor, as one must already be an independent contractor in order to be eligible to use it. Therefore, Mr. Potts cannot meet his burden of proof by relying on the Form I-18 signed by Mr. Warner. He must prove that the characteristics of the employment relationship were in fact that of employer and independent contractor at the time of the accident. To hold otherwise would frustrate the purpose of the workers' compensation system as employers could simply require all their workers to sign a Form I-18 and subsequently claim they were independent contractors, regardless of the actual nature of their relationship to their workers.

In any event, reliance on the Form I-18 overlooks the changed circumstances in the parties' relationship subsequent to September 2001. Initially, Mr. Potts claimed his business relationship with Mr. Warner had "always been the same." Yet he also testified that before September 2001, Mr. Warner "had his own people, his own work, he done [sic] it himself, and he got a check whenever he got a job done," whereas at the time of the accident he and Mr. Warner "would all work together to get the roof ready to shingle. That means I help him, he helps me." (Deposition of Barney Potts, p. 45, ll. 18-19; p. 65, ll. 4-6). When as here, analysis of the factors listed in Tenn. Code Ann. § 50-6-102(10) supports a finding that the worker was clearly an

employee at the time of an accident, a Form I-18 filed nearly two years earlier cannot be used to deny benefits, especially when coupled with the fact that there appears to be no form or regulation setting forth a procedure for revocation of the Form I-18.

Therefore, after careful review of the record, we reverse the holding of the trial court. We find that Mr. Warner was an employee on the date of his accident and remand this cause to the trial court for a determination of the degree of disability. The costs on appeal are taxed to the appellees, Barney Potts d/b/a Potts Roofing and Realm National Insurance Company.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ROBERT WARNER v. BARNEY POTTS d/b/a POTTS ROOFING, ET AL.

**Chancery Court for Rutherford County
No. 02-2853WC**

No. M2003-02494-SC-WCM-CV - Filed - April 29, 2005

ORDER

This case is before the Court upon the motion for review filed by Royal Insurance Company of America (TN), Realm National Insurance Company, Barney Potts d/b/a Potts Roofing, and Clarion Homes, Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Barney Potts d/b/a Potts Roofing and Realm National Insurance Company, for which execution may issue if necessary.

PER CURIAM